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IN THE

Supreme Court of the United States

October Term, 1957

No. 687

MURPHY AUTO PARTS CO., INC.,
Petitioner,

v.

THOMAS CHARLES BALL, through his next friend,
RITA H. BALL,
and
GEORGE J. BALL, SR., and RITA H. BALL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Murphy Auto Parts Co., Inc., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered in the above captioned case, affirming the judgment of the United States District Court for the District of Columbia.

OPINION BELOW

The United States Court of Appeals for the District of Columbia Circuit, in an opinion and judgment entered October 25, 1957 (R. 118-125) affirmed the judgment of

the United States District Court for the District of Columbia, entered on a jury verdict in consolidated actions for damages for personal injuries, prosecuted by the minor plaintiff, Thomas Charles Ball, and his parents, George J. Ball, Sr., and Rita H. Ball, against this Petitioner, and against one James Murphy, an employee of the Petitioner, owner and driver of an automobile which collided with and injured said minor plaintiff.

Your Petitioner moved for a rehearing in banc on November 8, 1957, (R. 126-133), and said petition was denied November 22, 1957 (R. 134).

The decision below has not been officially reported. A copy of the opinion is hereto annexed. (Appendix).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under the provisions of Title 28, Section 1254(1), of the United States Code.

QUESTIONS PRESENTED

1. In direct conflict with the decision of another Circuit Court of Appeals on the same matter, and contrary to the applicable decisions of this Court, the Court below has sanctioned a radical departure from the fundamental substantive law of agency by sustaining the admission into evidence of the hearsay declaration of an alleged agent as the only proof that the agent was engaged within the scope of his employment at the time the injuries were inflicted by him on the minor plaintiff.

2. The opinion below, contrary to the applicable decisions of this Court, declares the res gestae exception to the evidentiary rule against hearsay testimony to be an exception to the substantive principle of agency which requires agency to be established by independent evidence as a condition precedent to the admission of declarations of an agent sought to bind his principal.

3. Contrary to the applicable decisions of this Court, and in direct conflict with the decision of another Circuit Court of Appeals, and against the great weight of authority in the United States, the Court below, in its opinion, has eliminated as "spurious" the fundamental rule of evidence that a spontaneous utterance, to be admissible under the res gestae rule, must explain or "illuminate" the exciting event by which it is alleged to have been prompted and which is the subject in issue.

4. The decision below concedes the existence of general confusion among the courts of this country between vicarious admissions and excited utterances as applied to the law of agency, and in attempting to rationalize the problems presented has created a precedent which imperils the rights of all employers in actions for the tortious acts of their employees.

5. The decision has created questions of gravity and importance which ought to be settled by this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, in pertinent part, provides:

> "No person shall be * * * * * deprived of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

On October 20, 1952, James Murphy, an employee of the Petitioner, terminated the duties of his employment in Petitioner's store in Takoma Park, D.C., at 5:00 P.M., and an hour and a half later, while off duty and driving his own private automobile toward his home in Southeast Washington in pursuit of purposes entirely his own, collided with the respondent, Thomas Charles Ball, a minor. About a month thereafter, said minor, through his mother and next friend, Rita B. Ball, brought an action for damages against James Murphy in the District Court.

Some sixteen months later, the same plaintiff filed another action in the same Court against the Petitioner, alleging that at the time of the accident which occasioned his injuries James Murphy was operating his automobile on business of the Petitioner. Thereafter, Mrs. Ball and her husband, George J. Ball, Sr., filed another action in said Court for damages consequent upon the injuries to their son, naming both James Murphy and this Petitioner as defendants. These three actions were consolidated and tried to a jury in June, 1956. The jury returned verdicts in favor of all plaintiffs against both defendants, and the Court entered judgment accordingly.

Discussion of the facts of the accident is not necessary for the reason that this appeal concerns only the question of agency involved.

At the trial the plaintiffs were permitted, over objection, to introduce in evidence testimony of Rita H. Ball to the effect that when she arrived at the scene of the accident, after her son had been removed to a nearby doctor's office, she was approached by James Murphy, who told her "*that he was sorry, that he hoped my son wasn't seriously hurt, he had to call on a customer and was in a bit of a hurry to get home.*" (R. 81A). The manifest purpose of this evidence was to prove that James Murphy was engaged on an errand for his employer at the time and place of the accident, and thereby to establish liability on the part of the employer. The trial judge ruled that the declaration was a part of the res gestae, and admitted it for the purpose for which it was introduced, as aforesaid (R. 81A-87A).

James Murphy did not appeal from the judgment against him.

The Petitioner contended on appeal that the declaration was inadmissible to prove agency, and that without it the evidence was insufficient to prove agency, and that

the trial judge should have granted motions for directed verdict (See Supplemental Record on Appeal).

The Court of Appeals in its opinion, finds that the dispute in issue before the trial court was *"whether James Murphy was engaged in his employer's business at the precise time appellee's injuries were inflicted"* and, upon the record, concludes that the *apppellant "correctly points out that absent the alleged utterance of James Murphy there was not sufficient evidence on which a jury could find that he was acting within the scope of his employment when the accident occurred."* (R. 120). The Court of Appeals thus confined itself, and properly so, to the single clearcut question whether the declaration of the agent, standing by itself, was sufficient to establish liability on the part of the employer. If it was not, the defense motions for a directed verdict should have been sustained, and the judgment reversed. The Court below held the declaration admissible, and affirmed the judgment of the District Court. (R. 118-124).

REASONS FOR GRANTING CERTIORARI

I.

This Court has held that the hearsay declarations of an agent as to the scope of his authority is not admissible to bind his principal unless the fact of agency is first proven by other independent evidence.

First Unitarian Soc. v. *Falkner*, 91 U.S. 415, 417, 23 L.Ed. 283.

United States v. *Boyd*, 46 U.S. (6 How.) 29, 50, 12 L. Ed. 36

Union Packet Co. v. *Clough*, 20 Wall. 528, 22 L.Ed. 406

American L. Ins. Co. v. *Mahone*, 21 Wall. 152, 22 L.Ed. 593

Vicksburg & Meridian R. Co. v. *O'Brien*, 119 U.S. 99, 7 S.Ct. 118, 30 L.Ed. 299

Winchester & Partridge Mfg. Co. v. *Creary*, 116 U.S. 161, 29 L.Ed. 591, 6 S.Ct. 369

Goetz v. *Bank of Kansas*, 119 U.S. 551, 30 L.Ed. 515, 7 S.Ct. 318

Ins. Co. v. *Moseley*, 8 Wall. 397, 19 L.Ed. 437 (Dissenting opinion of Mr. Justice Clifford)

The decision below holds the contrary, and is also in direct conflict with the almost identical case of *Dudley* v. *Preston Motor Company* (1931) 51 F.2d 8, in the Sixth Circuit Court of Appeals. There an employee, driving his employer's automobile, made a declaration alleged to have been a part of the res gestae, to the effect that he was on business for his employer at the time of the accident involved. The declaration was offered in evidence as proof of the employer's liability. The trial court excluded the declaration, and the Circuit Court of Appeals affirmed, stating:

> "Considering the evidence in its most favorable light for appellant, we conclude that it does not substantially show that at the time of the accident Roberts was engaged in any business for appellee or that appellee had either expressly or impliedly authorized him to use the automobile upon that occasion. We think that he was upon a trip entirely personal to himself, and that there is no substantial relevant evidence to the contrary, and the judgment therefore should be affirmed. See *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 254, 45 S.Ct. 300 69 L.Ed. 597; *American Oil Co.* v. *Frederici*, 47 F. 2d 54, 57 C.C.A. 6.
>
> "Appellant testified that at the time of the accident, and after his son had been taken out of the wrecked car, Roberts made the statement to him which he repeated the succeeding day in the presence of Preston and Kilpatrick as above indicated. This testimony was offered as a part of the res gestae, and its introduction was denied. We think there was no error in its denial. It threw no light upon the cause of the collision. The manifest purpose of appellant in the introduction of it was to use this declaration of Roberts as evidence of his agency for which purposes it was, of course, incompetent."

The decision in *Dudley* is in conformity with the decisions of this Court, above referred to, and with numerous cases collected in 163 A.L.R. 1980, and 3 A.L.R. 2d 606, under the heading:

> "By the weight of authority, the declaration of one alleged to have caused an accident that he was employed by the defendant, or that he was then engaged in some business for the defendant, is inadmissible, even though made under such conditions as would otherwise qualify it as part of the res gestae."

II.

This Court has so firmly recognized that hearsay evidence is inadmissible to prove a fact capable of being established by evidence *aliunde* that it would seem unnecessary here to cite the numerous decisions to that effect. This Petitioner submits that the hearsay admission of an agent is no less hearsay or any more binding upon the principal because it is an "excited utterance." The opinion below reaches an opposite conclusion by a fallacious rationalization of the two distinct and unrelated principles of vicarious admissions and excited utterances, in the process of which a novel theory of "reliability" is evolved by the Court, which clashes with the rules of law and evidence on the subject as laid down by the decisions of this Court above noted. The reasoning of the opinion is as follows:

(a) First, the Court, departing from the established principles of the above cases, reasons that the rationale of excluding statements of an employee concerning his authority seems to rest, not upon the assumed want of authority of the agent to make them, but upon the "*assumed want of reliability* of the statements."

(b) Reasoning from this legally unsupportable premises, the opinion holds that the "want of reliability" of an agent's declarations is cured if they are within the

area embraced by the spontaneous declaration exception to the rule gainst hearsay evidence. Without citation of authority to support this proposition, the Court places itself again in conflict with the decision in *Dudley* and the decisions of this Court above cited, and with the great weight of authority in the United States, which hold that authority must be shown.

(c) Proceeding, the Court seeks to close its syllogism by concluding that the vicarious admissions rule, "a substantive rule of agency," which would otherwise exclude the declaration of the agent in this case, may be wholly disregarded if the declaration qualifies as a spontaneous declaration under the evidentiary rule of res gestae.

Discovering a serious obstacle to its reasoning, arising by reason of a fundamental requirement of the res gestae rule, the Court committed a further transgression of the settled law by simply obliterating it. "A majority of decided cases and authorities" says the Court, "appear to require the presence of three elements in order for an out of court statement to qualify as an excited utterance or spontaneous declaration." (R. 123). One of these important elements—that "the utterance must explain or illuminate the exciting event"—is absent from the evidence in this case, because the alleged declaration of James Murphy, above quoted, clearly did not shed any light upon the facts of the accident, but was merely an expression of concern and sympathy over the condition of the injured boy, coupled with a narrative of circumstances entirely disconnected with the accident. However, having newly constructed a radical and untenable theory of "reliability" as a substitute for the rule of agency, the Court was enabled easily to resolve the difficulty by finding that the element is "spurious", because, it says, the "reliability of the utterance is not inflexibly dependent upon the subject matter of the utterance." Thereby again the bar to admissibility of the hearsay admissions of an

agent was let down to bind the principal, contrary to the decisions of this Court. See *Beaver* v. *Taylor*, 68 U.S. 637, 17 L.Ed. 601. And again the opinion conflicts with the Sixth Circuit Court of Appeals in *Dudley* v. *Preston Motor Company*, supra., and the weight of judicial authority in the United States.

Wigmore on Evidence is erroneously construed by the opinion below to argue that the substantive rule of agency in this case must yield to the evidenciary rule of res gestae as to the requirements for the establishment of the authority of an agent to bind his principal (R. 122). Professor Wigmore holds the exact opposite (See quotation at R. 128-129).

III.

The decision below has created a dangerous rule of evidence, which substitutes for the substantive rule of agency required to be applied in the exercise of judicial judgment subject to examination and correction by the appellate court, a discretionary power of the trial court to disregard the substantive law if it decides that the agent's declaration is truly spontaneous, as weighed by the altered standard which eliminates the essential element of relevancy.

If found to be spontaneous in the exercise of the trial court's discretionary judgment, the opinion below says the declaration is admissible "*if it is relevant*". Relevant to what? Relevant to the "exciting event"? No. The opinion eliminates the element of relevancy from the res gestae rule. Therefore, it is clear that the Court means relevancy with respect to the question of agency; and here the opinion repudiates its own argument and conclusion, for the applicable decisions of this Court require evidence of agency independent of the declaration of the agent himself to be introduced as a condition precedent to the acceptance of his declaration as against the prin-

cipal. This is a substantive rule of law which the trial court is bound to apply, and as to which it cannot lawfully exercise discretion.

IV.

It is respectfully submitted that there is no more effective way of depriving a party of the protection of the Fifth Amendment to the Constitution of the United States than to deny to him the benefit of the rules of evidence which the Courts have established for the protection and preservation of his rights and property. The opinion below is violative of due process in the several departures from fundamental principles above enumerated.

V.

The opinion below is, as has been shown, confusing and self-contradictory. If allowed to stand, a rule of evidence is created by which all employers, including the United States Government itself (see Federal Tort Claims Act) are put to the peril that an employee, off duty, driving his own automobile in pursuit of his private affairs, may exclaim excitedly following an accident that he was engaged at the time on an errand for his employer and, regardless of the truth of his declaration, and without any other proof of agency, his "excited utterance" may be admitted in evidence against the employer and subject him to a judgment for damages.

VI.

Questions of gravity and importance are here presented and required to be settled by this Court, for it is perfectly obvious that the opinion below seizes upon what is regarded as confusion and turns it into chaos. Illustrative of this statement are such expressions contained in the opinion, as follows:

"The decided cases dealing with the admissibility of statements of an employee, concerning his authority, are in confusion as to the basis for receiving such evidence."

"There has been general failure to recognize that the rationale of the excited utterance doctrine furnishes a separate and distinct basis for admissibility, not to be confused with the vicarious admissions rule."

"Unfortunately few courts have recognized this and there has been a general tendency to blur the requirements of vicarious utterances and excited utterances."

The Court below needed only to give effect to the established principles of agency and rules of evidence as laid down by this Court, and other Federal courts. Instead, the Court has carried the rule concerning spontaneous utterances into an entirely new field, and in doing so has departed from the universally accepted legal standards and announced a precedent destructive of the rights of all business men and employers.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this petition for certiorari should be granted.

Respectfully submitted:

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13599

MURPHY AUTO PARTS CO., INC., APPELLANT

v.

THOMAS CHARLES BALL, through his next friend, RITA H. BALL, APPELLEE

No. 13600

MURPHY AUTO PARTS CO., INC., APPELLANT

v.

GEORGE J. BALL, SR. and RITA H. BALL, APPELLEES

Appeals from the United States District Court for the District of Columbia

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Decided October 25, 1957

Mr. R. Sidney Johnson, with whom *Mr. Guy B. Hardy* was on the brief, for appellant.

Mr. Albert J. Ahern, Jr., with whom *Mr. James J. Laughlin* was on the brief, for appellees.

Before BAZELON, FAHY and BURGER, *Circuit Judges*.

BURGER, Circuit Judge: The issue presented by this appeal is whether an alleged out of court utterance of an employee, driving his own car after working hours, stating that he was on an errand for his employer, is admissible to show that he was in fact engaged in his employer's business at the time of a collision with a pedestrian, where the statement is a spontaneous declaration or excited utterance.

The facts are essential to a complete understanding of the precise legal issues presented. Appellee Thomas Ball, a minor, was injured in 1952 when struck by a passenger car owned and driven by James Murphy. James Murphy was employed as a clerk by his stepfather's business concern, appellant here. The injury occurred at 6:30 P.M., one and one-half hour after his regular work day which terminated at 5:00 P.M. Appellee Rita Ball, the mother of the injured child, testified that immediately after the injury and at the scene of the accident, James Murphy "told me that he was sorry, that he hoped my son wasn't seriously hurt, he had to call on a customer and was in a bit of a hurry to get home." James Murphy denied making this or any statement to Mrs. Ball.

It is admitted that James Murphy was employed as a clerk by Murphy Auto Parts Co. on the day of the injury to the minor appellee. It was shown that he received a regular allowance for auto expense[1] but both Murphy and his employer insisted all Murphy's duties were inside clerical work and denied he was authorized to use his personal car for company business. The record shows that at a later date, some months after the acci-

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[1] The books of appellant corporation show James Murphy received $10 a week car allowance in addition to his salary. Officers of appellant corporation testified this was simply a means of giving James added compensation and to pay him for his cost of transportation to and from work.

dent, James Murphy did make calls on customers using his own car. Thus it is clear that there was a relationship of master and servant, leaving in dispute whether James Murphy was engaged in his employer's business at the precise time appellee's injuries were inflicted. The utterances attributed to James Murphy immediately after the collision tend to show he was at that time on an errand for his employer, and if properly received furnish adequate support for the findings of the jury.

Appellant relies first on the general proposition that the declaration of an agent concerning his authority is inadmissible against his employer[2] and correctly points out that absent the alleged utterance of James Murphy there was not sufficient evidence on which a jury could find that he was acting within the scope of his employment when the accident occurred. Second, appellant urges that under the so-called excited utterance rule such utterances are admissible only and narrowly to explain the exciting occurrence and for no other purpose.

The decided cases dealing with the admissibility of statements of an employee, concerning his authority, are in confusion as to the basis for receiving such evidence. The broadly stated proposition that the authority of an agent cannot be proved "out of the mouth of the agent" is true only if it is considered with its numerous exceptions, which taken together render the general proposition one of relatively little significance. The rationale of excluding such statements seems to rest on the assumed want of reliability; the exceptions to the "rule" tend to rest on finding reliability in the circumstances of the utterance. For example, when made in court under oath subject to the tests of cross examination and penalties of

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[2] See, *e.g.*, Russell v. Washington Sav. Bank, 23 App.D.C. 398 (1904); RESTATEMENT, AGENCY § 285 (1933); 3 A.L.R. 2d 598 (1949) and prior annotations there cited, covering comprehensive discussion of this subject.

perjury, those circumstances are regarded as making the statement sufficiently trustworthy to be received.[3] Or, where other independent evidence of authority is present, the assumed want of reliability of the statements is regarded as sufficiently cured by that corroboration.[4] A third category of circumstances regarded as curing the want of reliability or reasonably insuring reliability is the area embraced within the spontaneous declaration, or more aptly called, the excited utterance exception.[5] Here we are still dealing with hearsay but its want of reliability is regarded as satisfied by the circumstances in which the statement is made. The prompt, spontaneous character of the utterance under the impact and stress of the exciting event which "stills the reflective process" provides the circumstances, which, experience shows us, make for reliability.

There has been a general failure to recognize that the rationale of the excited utterance doctrine furnishes a separate and distinct basis for admissibility, not to be confused with the vicarious admissions rule. Under the vicarious admissions rule, a substantive rule of agency, an agent's out of court statements as to his authority (or any other relevant matter) may be received even though hearsay, in other evidence proves he was authorized to speak. There the element of reliability is not a problem since it is the *fact* of the utterance, not its truth which is in issue.[6]

Thus, if the words qualify as a vicarious utterance, *i.e.*, the authorized words of the principal uttered by the agent, it is not necessary that they also qualify as ex-

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[3] See MECHAM, AGENCY § 291 (1914).

[4] See *id.* § 1774.

[5] WIGMORE, EVIDENCE § 1745 (1940).

[6] See RESTATEMENT, AGENCY §§ 285, 286 (1933); WIGMORE, EVIDENCE § 1078 (1940).

cited utterances. If they qualify as excited utterances there is no rational basis for demanding more, since the want of reliability has been cured by the circumstances, as has been pointed out.

Unfortunately few courts have recognized this and there has been a general tendency to blur the requirements of vicarious utterances and excited utterances.[7] Mecham dispels this confusion, stating:[8]

> "Although they thus cannot be regarded as *authorized*, the declarations and admissions of an agent may often be put in evidence upon an entirely different ground, namely, that they constitute [a spontaneous utterance] . . . . The use here . . . does not necessarily depend upon the law of agency at all. It is a rule of evidence, and is just as applicable in a proper case to one who was not an agent at all as to one who was an agent . . . . The theory is that the spontaneous utterances of one who speaks under the excitement of the moment and before he has had time to deliberate—to concoct a self-favoring story—are likely to be true."

Professor Wigmore agrees:[9]

> "That there are two distinct and unrelated principles involved must be apparent; and the sooner the Courts insist on keeping them apart, the better . . . ."

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[7] Undoubtedly some of the confusion between vicarious utterances and excited utterances is due to the use of *res gestae* for either doctrine. See WIGMORE, EVIDENCE §§ 1768-9 (1940). Use of the term res gestae has been criticized because its meanings "are as numerous as the various cures for rheumatism, and about as useful." Coryell v. Clifford F. Reid Inc., 117 Cal.App. 534, 4 P.2d 295 (1931) (dissent).

[8] MECHAM, AGENCY § 1793 (1914). For a case applying, if not recognizing this principle, see Chantry v. Pettit Motor Co., 156 S.C. 1, 152 S.E. 753 (1930), and full discussion in the dissent. *Cf.* Mancuso v. Hurwitz-Mintz Furn. Co., 183 So. 451 (La.App. 1939); Lowie v. Dixie Stores Co., 172 S.C. 468, 174 S.E. 394 (1934).

[9] WIGMORE, EVIDENCE § 1078 (1940).

We are satisfied, therefore, that when out of court statements qualify as excited utterances, the hearsay rule removes its bar to admissibility. The fact that the utterer is an agent is immaterial so far as admissibility as an excited utterance is concerned.[10]

We turn now to appellant's argument that the part of the alleged utterance of James Murphy tending to show that he was on an errand for his employer did not qualify as an excited utterance, because is did not illuminate the exciting event but rather went to the issue of his authority.[11]

A majority of decided cases and authorities appear to require the presence of three elements in order for an out of court statement to qualify as an excited utterance or spontaneous declaration. These are (a) an exciting event (b) an utterance prompted by the exciting event without time to reflect, *i.e.*, dominated by the nervous excitement of the event, and (c) the utterance must explain or illuminate the exciting event.[12] But a careful analysis of the entire subject demonstrates that the third element, mechanically and narrowly construed, is a spurious element,[13] and that reliability of the utterance is not inflexibly dependent upon the subject matter of the utterance.

The test for receiving the utterance, therefore, should be whether it mets the first two requirements of a spon-

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[10] See WIGMORE, EVIDENCE § 1756a (1940); RESTATEMENT, AGENCY § 289, comment (d) (1933); Note, *Theoretical Bases of Admitting Agent's Declarations*, 37 KY.L.J. 117 (1949).

[11] See Dudley v. Preston Motor Co., 51 F.2d 8 (6th Cir. 1931); Deater v. Penn Mach. Co., 311 Pa. 291, 166 Atl. 846 (1933).

[12] WIGMORE, EVIDENCE §§ 1750, 1754 (1940).

[13] As Wigmore points out this third element has been erroneously carried over from the verbal act doctrine. WIGMORE, EVIDENCE §§ 1752, 1754 (1940).

taneous declaration or excited utterance referred to earlier. This lies essentially with the trial court, and not unlike the evaluation of credibility is one based in part, at least, on observation of the witness, the context of the statement and all surrounding circumstances. It should be kept in mind that as soon as the excited utterance goes beyond description of the exciting event and deals with past facts or with the future it may tend to take on a reflective quality and must be more carefully scrutinized with respect to the second element, that of true spontaneity. In other words, the very fact that the utterance is not descriptive of the exciting event is one of the factors which the trial court must take into account in the evaluation of whether the statement is truly a spontaneous, impulsive expression excited by the event.[14] Most often the excited utterance, as a practical matter, relates to the exciting cause, *i.e.*, description of an accident, an attack, etc., but if the utterance goes beyond a description of the occurrence and still meets the other tests of the excited utterance rule, we think it should be received if it is relevant.[15]

We hold that the alleged out of court statement of James Murphy, uttered at the time of the accident, to the effect that he was on an errand for his employer, and expressly found by the trial court to have been an excited utterance, was properly received in evidence as such.

Affirmed.

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[14] "The purport of the statement and its relation to the exciting event should be merely matters to be considered in determining whether the declaration was probably spontaneous or was reflective." MCCORMICK, EVIDENCE § 272 n. 15 (1954).

[15] See Metropolitan R. Co. v. Collins, 1 App.D.C. 383 (1893), which suggests that the trial court should use its discretion more cautiously when the utterer is an agent, and may have a self-interest in claiming to be within the scope of his employment.